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ABSTRACT

The question of whether protection against unauthorized use of a person's name of likeness for commercial gain is subsumed under property rights or the right to privacy remains unsettled. The thesis of this article is that either area may be appropriate, depending on the plaintiff's motivation in bringing the action. The case of Lugosi v. Universal Pictures illustrates the situational nature of the choice. Historically, the first two privacy cases involved the unauthorized use of a portrait or name for advertising purposes, but the primary interest in both was protecting individual dignity. The central concern in Lugosi, however, was the protection of property rights. Privacy has been recognized as inadequate in protecting celebrities' property rights because the very circumstance of being well known can prevent recovery. Some courts have recognized a "right of publicity" in cases involving professional athletes, an approach that may overcome the shortcomings of privacy law for celebrities, if not for the ordinary citizen. Any nondignitory cases concerning commercial appropriation of an individual's name or likeness should no longer be regarded as part of privacy law but should be considered as some form of common-law property right. (Author/JM)

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COMMERCIAL USE WITHOUT CONSENT: PRIVACY OR PROPERTY?

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Briefly, the thesis of this article is that while some cases heretofore placed in the appropriation category of privacy law[1] are properly considered privacy cases, others would more reasonably be classified as property law. Cases in which the plaintiff wants to prevent the defendant from using or continuing to use plaintiff's name, picture or likeness in advertisements or for other trade purposes are, in the writers' eyes, legitimately labelled privacy cases. Yet other plaintiffs, as in the recent case of Lugosi et.al. v. Universal Pictures Company, Inc., et.al.,[2] are simply interested in securing compensation for the previously unauthorized commercial use of some aspect of their personality. Both types of appropriation would be considered actionable torts, but one revolves around privacy, the other around property. While this distinction is not original to the authors, it has received little attention in the literature of mass communications.

The Lugosi case, described below, bears little resemblance to the first two litigations now referred to as privacy cases, Roberson v. Rochester Folding Box Co.[3] and Pavesich v. New England Life Ins. Co.,[4] which in turn bear little resemblance to the privacy tort described by Samuel Warren and Louis Brandeis in their influential article.[5] Warren and Brandeis were concerned only with public disclosures by the press of non-defamatory information relating to the private lives of individuals, with the individual's right to retain his anonymity. The two early cases cited above,

however, contain an element not forseen by Warren and Brandeis: appropriation of the plaintiff's name or likeness for commercial purposes.

In the first case, Abigail Roberson attempted to recover $15,000 in damages for the physical and mental suffering she experienced because of the unauthorized use of her photograph on flour boxes. Plaintiff made it clear that she wanted to prevent further use of her likeness for this purpose.

Similarly, Pavesich sued to prevent defendant from continuing to use his photograph as a testimonial for defendant's life insurance policies. Nowhere in the case was there a clue that Pavesich was merely seeking compensation for the commercial value of his likeness or attempting to profit from an exclusive property interest. He simply wished to retain his privacy, and as Professor Edward Bloustein of the New York University School of Law pointed out in an often-cited article that appeared in 1964, the interest being protected in these two appropriation cases was essentially the same as what is protected in the intrusion and public disclosure areas of privacy law.[6] The primary interest in Roberson and Pavesich was in protecting individual dignity, not property, whereas the central interest in the Lugosi case was the protection of a property right.

Almost every scholar writing in this field agrees that privacy is an unsettled area of the law. Donald Smith has remarked that the development of privacy law "...has been so uneven and its performance so unsatisfactory that, if torts had tear ducts, it might weep that it was ever born,"[7] and several legal thinkers have offered suggestions as to how to improve the situation.

In 1954 Melville Nimmer, attorney for Paramount Pictures, published an article that urged general acceptance of a "right of publicity," a right that Nimmer considered to be the direct opposite of privacy rights.[8] He argued that the Warren and Brandeis concept of privacy was satisfactory to meet the needs of 19th century Boston, but that subsequent development of new mass media and their

concomitant advertising made existing privacy law outmoded, at least for well known personalities connected with these new media. "With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century."[9] Such personalities, he said, were more apt to need protection of their publicity rights than their privacy rights. (If one defines a celebrity as someone who is well known for being well known, Nimmer's point has obvious validity.) In pressing his argument, Nimmer outlined what he considered to be the inadequacies of 1) privacy, 2) unfair competition, and 3) contract law in protecting the property rights of celebrities in their name and likeness.

Privacy law is inadequate, Nimmer said, because 1) some courts have found that the very fact of being a celebrity prevents recovery, even in the appropriation area,[10] 2) in various jurisdictions no recovery has been allowed unless the appropriated name or likeness had been used in an offensive manner,[11] 3) privacy has been viewed as a personal rather than a property right, making the right non-assignable to heirs,[12] and 4) the right of privacy is limited to human beings and offers no protection to animals (such as Lassie) or to business enterprises.[13]

Unfair competition law is considered inadequate to protect these property rights in that the absence of competition between plaintiff and defendant has prevented recovery in some jurisdictions[14] and in that some courts have held that no unfair competition exists unless it can be proved that defendant had "passed off," or falsely represented the goods or business of plaintiff as defendant's own.[15]

Finally Nimmer considers the law of contracts less than adequate in that contract protection extends only to the parties to contracts.[16]

The first clear court recognition of a right of publicity separate and distinct from the right of privacy was in Haelan Laboratories v. Topps Chewing Gum,[17] a 1953 decision involving the nature of a baseball player's rights to control distribution of his photograph in the marketing of bubble gum. In this decision Judge Jerome N. Frank held that a professional athlete has an individual right of publicity and that such a right could be appropriately considered a property right.

Two more recent cases of a similar nature produced the same conclusion. In Cepeda v. Swift and Company (1969)[18] and Uhlaender v. Hendricksen (1970),[19] both involving appropriations of the name and likeness of baseball players, the courts held that something distinct from privacy had been violated and took a property approach. An interesting bit of legal trivia is that in the Uhlaender case, the court decided that an athlete has property rights not only in his name and likeness, but in his statistics as well.

With this background, let us consider the facts of the Lugosi case. How to classify the case seems to have been a problem from the very beginning. The action by Bela George Lugosi and Hope Linninger Lugosi, son and widow of the late film star Bela Lugosi, was brought as a breach of contract suit. Defendant Universal Pictures wanted the case classified as a privacy action, since courts, as a general rule, have considered that privacy rights die with the deceased person, preventing recovery by heirs.[20] The court found no breach of contract, was not willing to consider the circumstances a privacy invasion, but instead declared that the late Mr. Lugosi's name and likeness constitute a property right distinct from a privacy right and legally able to descend to his heirs and beneficiaries

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under the terms of his will. To add to this classificational muddle, when the case was reported in the U.S. Patents Quarterly, it appeared under the heading "Copyrights."

The case involved Bela Lugosi's celebrated role as Count Dracula, a role that he first played for Universal Pictures in 1931 in the motion picture "Dracula." Over a span of years, Universal has produced a number of horror films featuring monsters of one kind or another, such as Frankenstein's Monster, Wolf Man, The Mummy, The Creature, The Phantom, Mr. Hyde, The Mutant, Moleman, The Hunchback, and, of course, Count Dracula. Beginning in 1960, Universal entered into various licensing agreements which allowed manufacturers to reproduce likenesses of some of these horror characters on sweatshirts, playing cards, games, masks, and other products.

Plaintiff contended that defendant's actions constituted a breach of Bela Lugosi's 1930 contract with Universal; defendant contended that the contract had reserved no merchandising rights to Bela Lugosi. At the heart of the controversy was the contract's grant-of-rights clause, a clause customarily included in contracts between actors and producers. The grant-of-rights clause in the Lugosi contract specified that Universal Pictures retained the right to :

> use and give publicity to the artist's name and likeness, photographic or otherwise, and to recordations and reproductions of the artist's voice and all instrumental, musical, and other sound effects produced by the artist hereunder; in connection with the advertising and exploitation of said photoplay.[21] (Emphasis added.)

The decision of the court was that plaintiff was entitled to recover inasmuch as 1) the products licensed to bear the Dracula likeness were not marketed in any connection with the promotion of the photoplay "Dracula" and 2) the grant-of-rights clause did not specifically assign merchandising rights to defendant.

Precedent cases cited in the decision were equally colorful, involving pre-adult-western stars Roy Rogers[22] and Gene Autry[23] and the detective character Sam Spade.[24] Both Roy Rogers and Gene Autry lost their cases, which were concerned with the exhibition of their movies on television, because the grant-of-rights clauses in their contracts were more nearly all-inclusive. The Sam Spade case involved the question of exclusive rights to use the characters appearing in the movie "The Maltese Falcon." The decision in this case allowed the author of "The Maltese Falcon" to retain the right to use Sam Spade and other characters in subsequent books, though Warner Brothers had claimed that their contract allowed them exclusive use of these characters.

Since Universal Pictures had copyrighted the photoplay "Dracula," the company argued that this copyright allowed the licensing of merchandising rights to Lugosi's portrayal of the Dracula character. The court ruled against this assertion, reasoning that the character Count Dracula, as a general character, is in the public domain, but that when Lugosi played the role, he created through his own personality and facial characteristics elements of originality that allowed this portrayal to have copyright protection. The court further ruled that the Lugosi portrayal of Dracula would be protectable against infringing manufacturers who used the character without Universal's permission, but defendant's copyright of the photoplay could not override the limitations of the contract between Universal and Bela Lugosi.

Clearly privacy law as it now exists does not come in a very neat package. Bloustein points out that privacy is "...a composite of the interests in reputation, emotional tranquility and intangible property."[25] The first two represent protection of human dignity, the third may or may not be dignitory in nature. In the

Roberson and Pavesich cases, the plaintiffs felt demeaned or humiliated by the commercialization of their personalities; in the Lugosi case, the plaintiffs were merely trying to protect a property right to which they felt entitled. In regard to the latter type of case, the courts in the Haelan Laboratories, Cepeda, Uhlaender, and Lugosi cases found no important purpose served by making an individual a part of commerce against his will or by allowing defendants free use of some aspect of an individual's personality that has market value, unless expressly agreed upon.

The authors conclude that non-dignitory cases dealing with intangible property should no longer be considered a part of privacy law but should be regarded, through court precedent, as a form of common-law property right.

The "right of publicity" seems a reasonable term to use for this property right, but what it presently implies may be too restrictive. Most writers who favor recognition of a right of publicity appear concerned only with the property rights of well known public figures, who, granted, are more often involved in these cases than are persons who are not known by the general public. Don Pember suggests that "...the property value in a name should be proportional to the fame of the personality" and that the name or likeness of an ordinary, non-public individual carries a value that barely exists.[26] The authors of this article do not entirely agree. Even the most obscure person who discovers that his name or likeness is being used in an advertisement or for some other commercial purpose should, if he is not offended by such use, be able to secure reasonable compensation.

Some legal thinkers have speculated that the right of privacy may in the future engulf and absorb the much older body of defamation law.[27] Should this ever happen, non-dignitory appropriation cases would appear more out of place

than ever, inasmuch as the closest analogy to defamation protection comes in the public disclosure of embarrassing facts and false position in the public eye areas of privacy law.

It has also been suggested that, in John Wade's words, "...the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering...to constitute a single, integrated system of protecting plaintiff's peace of mind."[28] Again, non-dignitory appropriation cases would not seem to belong here.

Finally it should be acknowledged that some unauthorized appropriations will not offend the party whose name or likeness has been used in advertisements or for some other trade purpose. A politician might welcome such use and consider it free publicity that would increase his vote-getting potential, or should some modern-day Abigail Roberson be "discovered" by an important movie producer, she might feel only gratitude for the appropriation and give no thought at all to securing compensation.

1 See William L. Prosser, "Privacy," 48 Cal. L. Rev. 389 (1960). The four separate torts as listed by Prosser were:

1. Intrusion upon the plaintiff's seclusion or solitude; or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false position in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

2 No. 877875, Memorandum Opinion, Superior Court of the State of California for the County of Los Angeles (1972). Reported in 172 U.S.Pat.Q.541. See also Performing Arts Review 3:1 (1972), pp. 19-62.

3 171 N. Y. 538, 64 N. E. 442 (1902).

4 122 Ga. 190, 50 S. E. 68 (1905).

5 4 Harv. L. Rev. 193 (1890).

6 Edward J. Bloustein, "Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser," 39 N. Y. L Rev. 962 (1964).

7 Donald L Smith, "Privacy: The Right That Failed," Columbia Journalism Review, 8:18-22 (Spring 1969).

8 Melville B. Nimmer, "The Right of Publicity," 19 Law & Contem. Prob. 203 (1954).

9 Ibid., p. 204.

10 O'Brien v. Pabst Sales Co., 124 F. 2d 167 (5th Cir. 1941); Martin v. F. I. Y. Theatre Co., 10 Ohio Ops. 338 (1938); Gautier v. Pro-Football, Inc. 304 N. Y. 354, 107 N E. 2d 485 (1952).

11 Gill v. Hearst Publishing Co. 40 Cal. 2d 224, 253 P. 2d 441 (1953); Miller v. Madison Square Garden Corporation, 176 Misc. 714, 28 N. Y. S. 2d 811 (Sup. Ct. 1941).

12 See infra, p. 4 and n.20, p.4.

13 Lawrence v. Ylla. 184 Misc. 807. 55 N. Y. S. 2d 343 (Sup. Ct. 1945); Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W. D. Mo. 1912).

14 Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W. D. Mo. 1912).

15 Paramount Pictures v. Leader Press, 106 F. 2d 229 (10th Cir. 1939).

16 Lawrence v. Ylla, 184 Misc. 807, 55 N. Y. S. 2d 343 (Sup. Ct. 1945).

17 202 F. 2d 866 (2d Cir. 1953).

18 415 F. 2d 1205 (8th Cir. 1969).

19 316 F. Supp. 1277 (D. Minn. 1970).

20 Young v. That Was the Week That Was, 423 F. 2d 265 (1970), Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N. W. 2d 762 (1956).

An American Law Reports annotation provides a concise summary of posthumous publicity cases in privacy law, that is, cases in which the acts complained of were committed after someone's death (18 ALR 3d 873, 1968). In most such cases it is not clear whether the claim is based on the contention that the deceased's right of privacy survived him, enabling survivors to bring suit, or on a claim of "reflected injury," the argument that the survivor's privacy was invaded by publicity given to a deceased person to whom he was related or with whom he was closely identified. Courts in most jurisdictions have shown little sympathy in either instance, but three of the four states having privacy statutes allow survivors to sue. Utah's statute (Utah Code Annotated, sec. 76-4-9) extends recovery rights to heirs or

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personal representatives. The Virginia statute (Code of Virginia, sec. 8-650) limits recovery rights to surviving consort or next of kin, and Oklahoma's statute (Oklahoma Statutes Annotated, title 21, sec. 839.1) specifies that surviving spouse, personal representatives, or a majority of the deceased's adult heirs may sue.

21 172 U.S. Pat. Q. 542.

22 Republic Picture Corp. v. Rogers, 213 F 2d 662, 101 U. S. Pat. Q. 475 (9th Cir. 1954).

23 Autry v. Republic Productions, 213 F 2d 667, 101 U. S. Pat. Q. 478 (9th Cir. 1954)

24 Warner Bros. Pictures v. Columbia Broadcasting System, 216 F 2d 945, 104 U. S. Pat. Q 103 (9th Cir. 1954).

25 Bloustein, op. cit., p. 962.

26 Privacy and the Press (Seattle: University of Washington Press, 1972), p. 173.

27 Prosser, op. cit., p. 401; John W. Wade, "Defamation and the Right of Privacy," 15 Vand. L Rev. 1095.

28 Wade, op cit., pp. 1124-1125. Also see Harry Kalven, Jr., "Privacy in Tort Law--Were Warren and Brandeis Wrong?" 31 Law and Contem. Prob. 330 (1966).